Supreme Court of the United States

OCTOBER TERM, 1909.

No. 193.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant,

vs.

THE UNITED STATES.

Appeal from the Court of Claims.

Appellant's Brief.

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I.

The original petition was filed in the Court of Claims August 25, 1896, and the amended petition was filed July 19, 1900. (Page 1.)

To this amended petition the appellant demurred for two reasons:

First. Because the claim "has come to the claimant, if at all, by a pretended assignment which, as to the United States, is void."

Second. Because the amended petition does not state facts sufficient to constitute a cause of action. (Page 11.)

The right of the appellant to sue is pleaded at length in part VI of the amended petition. (Pages 9 and 10.) The essential portions are as follows:

"Your petitioner further avers that on the 30th day of September, 1890, it became the purchaser, and thereupon it became the lawful owner by assignment and transfer, of all of the capital stock of the said Milwaukee & Northern Railroad Company; that on the 1st day of October, 1890, the board of directors of the Milwaukee & Northern Railroad Company was reorganized by the election of persons who were either directors or officers of the petitioner, and the offices were filled by the election of persons who were officers of its company, with the solitary exception of the president of the Milwaukee & Northern Railroad Company; that from the 30th day of September, 1890, until the 26th day of June, 1893, that company operated the railroad as a separate orgeganization and in the name of the Milwaukee & Northern Railroad Company; that on the 26th day of June, 1893, pursuant to a vote of the stockholders of the Milwaukee & Northern Railroad Company, the latter company executed a deed to the petitioner, whereby it conveyed to petitioner all its railroads, railways, rights of way, depot grants, tracks, bridges, etc., and also all other property and choses in action whatsoever, both real and personal, of the said Milwaukee & Northern Railroad Company, and all its rights, privileges, and corporate franchises connected with or relating to such railroad or to the construction, maintenance, use, or operation of the same. And that thereafter, to wit, August 28, 1893, the Milwaukee & Northern Railroad Company held its last stockholders' meeting and its last directors' meet-

ing, and since that time it has not exercised any corporate functions or powers, nor has it pretended to do anything of the sort. Your petitioner avers that by reason of the premises it has been the owner of the claim in suit ever since June 26, 1893, and is now the owner of the foregoing claim, no part thereof having been assigned or transferred by the petitioner in any way, and that it is entitled to receive payment thereof."

We may summarize these averments as follows: The appellant became the owner, September 30, 1890, through purchase and assignment, of all the capital stock of the Milwaukee & Northern, and from that time until June 26, 1893, appellant operated the Milwaukee & Northern in the name of that company, at which latter date, pursuant to a vote of its stockholders, the Milwaukee & Northern conveyed to appellant all its railroads, rights of way, etc., all other property and choses in action, both real and personal, and all its rights, privileges, and corporate franchises, to the appellant. Since August 28, 1893, the Milwaukee & Northern has not exercised any corporate functions or powers.

In other words, the appellant absorbed or consolidated with the Milwaukee & Northern, a thing it had a perfect right to do under the laws of Wisconsin then and now in force.

In part I of the petition (p. 1), it is averred that the appellant's line extended from Milwaukee, Wisconsin, to Republic, Michigan, and thence was extended to Champion, Michigan. The line was in two States. This absorption or consolidation was lawful.

The company was organized under the laws of Wis-

consin. (Page 1.) Section 1830 of the laws of Wisconsin provided:

"Any railroad corporation heretofore or hereafter organized pursuant to any law of this State may exercise all its rights, franchises. and privileges in any other State or Territory in the United States, under and subject to the laws of the State or Territory where it may exercise or attempt to exercise the same, and may accept from any other State or Territory, and use any additional or other powers or privileges applicable to the carrying of persons and property by railway or steamboat in said State or Territory, or otherwise applicable to the doings of said corporation in said State or Territory."

This statute gave the appellant the right to exercise all its rights, franchises, and privileges in the State of Michigan but subject to its laws.

Turning now to section 1833 of the laws of Wisconsin, we find that any railroad corporation organized or existing under the laws of that State may consolidate its stock, franchises, and property with any other railroad corporation, whether within or without the State of Wisconsin, etc., and may become one corporation by any name selected. The section then proceeds as follows:

"Any such railroad corporation may lease or purchase, and take a conveyance or assignment of the railroad, franchises, immunities, and all other property and appurtenances, and the stock or bonds thereof, of any other railroad corporation, or any portion thereof, within or without this State, when their respective railroads can be lawfully connected and operated together to constitute one continuous main line, or when the road so purchased will constitute branches or feeders of any road maintained and operated by such purchasing corporation." * * *

This statute plainly conferred on the appellant the power to consolidate with the Milwaukee & Northern and purchase its stock, and the power to purchase and take a conveyance or assignment "of the railroad, franchises, immunities, and all other property and appurtenances, and the stock or bonds thereof." * * * Statutes of similar purport are in force in Michigan. Howell's Statutes, sec. 3343; Compiled Laws Mich. (1897), sec. 6254, 6339.

It will be observed that the conveyance or assignment under the Wisconsin statute not only covers the railroad, franchises, and immunities, but it also covers "all other property and appurtenances." This language covers the claim sued on in this case. The words "all other property" clearly include personal property, rights, claims, demands, and choses in action, as we think. If so, has there been such an assignment or transfer of the demand sued on as is forbidden by law?

Section 3477, Rev. Stat., forbids transfers or assignments of any claim upon the United States, or of any part or share thereof, or interest therein, unless made after the allowance of a claim, etc. Was the transaction by which the appellant took the conveyance and assignment of all the property and rights of the Milwaukee & Northern, such a transfer or assignment as is forbidden by section 3477? Here the corporate entity of the Milwaukee & Northern was absorbed by the appellant. The Milwaukee & Northern lost its corporate existence. The two corporations became one. All the properties, franchises, and immunities of the Milwaukee & Northern were merged into and became parts of the appellant corporation. The public functions that had been exercised and the public duties that had been performed by the Milwau-

kee & Northern have been exercised and performed by the appellant since June 26, 1893. At that time there was a complete legal union of the two companies but in the name of the appellant, and since that date the appellant has held and enjoyed all of the corporate properties, rights, privileges, franchises, and immunities of the Milwaukee & Northern. We submit that these transactions did not culminate in a result forbidden by section 3477, for everything done was expressly permitted by statute.

Section 3477 has been considered in a number of cases that seem to establish the principle for which we are contending.

This court has held that assignments for the benefit of creditors, and assignments to assignees in bankruptcy, do not fall within the prohibition of section 3477. This is so because all such assignments are made pursuant to laws expressly authorizing them. *Goodman* vs. *Niblack*, 102 U. S., 556; *Erwin* vs. *U. S.*, 97 U. S., 392; *Butler* vs. *Goreley*, 146 U. S., 303.

In the bankruptcy cases the assignments were made pursuant to the laws of the United States, but in the insolvency cases the assignments were made pursuant to the laws of the various States.

We ask particular attention to the fact that this court has more than once decided that an assignment made in compliance with the laws of a State is valid, lawful, and beyond the purview of section 3477. (See cases last cited.)

If an assignment for the benefit of creditors, made under a State law, is valid, notwithstanding the provisions of section 3477, it would seem to follow inevitably that an absorption, consolidation, merger,

or transfer, made as in part VI of the petition described, and in all respects in compliance with the laws of the States of Wisconsin and Michigan, must be held valid, lawful, and entirely beyond the provisions of that section of the Revised Statutes.

What is the effect of the Wisconsin statutes already quoted in this brief? What is the effect of that which was done between the appellant and the Milwaukee & Northern under that statute? The Wisconsin statute not only consents to, but authorizes, the consolidation of existing corporations. It is a general rule, in the absence of statutory denials or restrictions, that a consolidation of corporations has the effect of dissolving former corporations and at the same instant creating a new corporation with the properties, liabilities, and stockholders derived from the old, upon such terms and conditions as may have been prescribed by the act of consolidation. *McMahon* vs. *Morrison*, 16 Ind., 172. That case is printed with an elaborate note in 79 Am. Dec., 418, 422, and it was followed and approved by this court in *Clearwater* vs. *Meredith*, 1 Wall., 40, and *Shields* vs. *Ohio*, 95 U. S., 323.

Though the usual effect of a consolidation, as we have seen, is to dissolve the constituent companies, yet no such effect is produced as to the purchasing or absorbing company where the consolidation takes place through the absorption of one company by another under the purchase of its stock and properties. *Central R. R. Co.* vs. *Ga.*, 92 U. S., 665; 1 Beach. Priv. Corp., sec. 338; 1 Thomp. on Corp., sec. 324, 330. The existence of one company is thus merged into that of the other, in which case the latter is not dissolved. *Philadelphia & Wilmington R. R. Co.* vs. *Maryland*, 10 How., 376, 392, 393, 394; 1 Thomp. on

Corp., sec. 399, 400. This is the true rule, even if the act should refer to the merger as a "consolidation." *Central R. R. Co.* vs. *Ga.*, 92 U. S., 665.

When two or more companies unite or consolidate, and thus form a new or consolidated company, the latter, unless restricted by the laws under which the consolidation took place, succeeds to possession of the franchise, rights, privileges, and immunities of the several companies from which it is formed. 1 Beach on Private Corporations, sec. 340; 1 Thomp. Corp., sec. 365–379, 380–387, 396, 399, and cases cited, among them, *Zimmer* vs. *State*, 30 Ark., 677; *Thomlinson* vs. *Branch*, 15 Wall., 460; and *Indianapolis, etc., R. Co.* vs. *Jones*, 29 Ind., 465. This rule is adopted by statute in Wisconsin. Section 1833, above quoted.

And it is well settled that where one corporation goes entirely out of existence by being consolidated or merged into another, and no arrangements are made respecting the property and liabilities of the extinguished corporation, the one newly created will be entitled to all the property. *Thompson* vs. *Abbott*, 61 Mo., 176; *Davis* vs. *Memphis R. R. Co.*, 87 Ala., 633. These cases hold, also, that where two or more companies are consolidated, the new one may enforce the rights of the old one.

Railway consolidation often takes the form of absorption of one railway by another, as where branches are united with a trunk line, or short lines are united with longer lines so as to form one continuous line, as in the case at bar. It is well settled that in such cases, the absorbing company proceeds without change of name and succeeds to the rights possessed by the company so absorbed. 1 Thomp. on Corp., sec. 396.

It is also well established that all the choses in action of the old companies are transferred to the newly created company and may be enforced by it in its own name. *Cumberland College* vs. *Ish.*, 22 Cal., 641; *Miller* vs. *Lancaster*, 5 Coldw., 514; *University of Vermont* vs. *Baxter*, 42 Vt., 99. And be owned in its own name. *Indianola R. R. Co.* vs. *Fryer*, 56 Tex., 609; *University of Vermont* vs. *Baxter*, 42 Vt., 99; 1 Beach on Private Corporations, sec. 342.

Of special interest is the case of *Miller* vs. *Lancaster*, *supra*. The second point in the syllabus is as follows:

"After consolidation of railroad companies, the new acquire the rights of the old, and are subject to the liabilities of the old companies. Where a consolidation and merger of corporations are made, and such transfer of rights and properties, and assumption of liabilities between the old and the new companies are effected, the new company stands in the stead of the old companies, may enforce the rights of the old company, and be subject to its liabilities."

The rule that the new company takes all the liabilities of the former must be followed, *ex necessitate rei*, by a rule that the new company takes all the rights of the former. The burden of liabilities must be lightened or relieved by compensatory rights or no one would take up the burden.

Another interesting case is *University of Vermont* vs. *Baxter*, *supra*.

By the union of the University of Vermont and the Vermont Agricultural College, under the Act of the Legislature approved February 9, 1865 (Session Laws, 1865-96), out of two independent corporations, a new corporation was created in the name of the "Univer-

sity of Vermont, a State Agricultural College," and the property of the University passed to and vested in the new corporation.

The act in terms gives the right to the new corporation to maintain actions in its own name in relation to the real property vested in it by the union, but is silent as to the right to sue on choses in action, although it transfers them to the new corporation, and substitutes it for the original party without prejudice to the other party.

The court held that the act passed the right to the new corporation to sue in its own name upon such claims.

We submit that we have established the following propositions:

1. The claim of the Milwaukee & Northern was assigned to and vested in the appellant pursuant to statute. The proceedings were lawful, the lawful title to the claim sued on passed thereby to the appellant, and section 3744, Rev. Stat., does not apply.

2. The appellant has the right to sue on the claim in its own name.

Therefore the court below erred in sustaining the demurrer and in dismissing the petition.

II.

The second ground of demurrer (p. 11) is that the amended petition does not state facts sufficient to constitute a cause of action.

The first paragraph of the petition (p. 1) alleges substantially that on the dates named it owned and

operated the line of railroad in the petition described and, prior to the 4th of February, 1890, it owned and operated a railroad from Milwaukee, Wisconsin, to Republic, Michigan, a distance of 255.37 miles. The road was extended February 4, 1890, and put in operation from Republic, Michigan, to Champion, in that State, a distance of 8.89 miles, thus making a total mileage of 264.26 miles. Prior to that date, the road from Milwaukee to Republic had been designated by the postal authorities as Postal Route No. 139,016, and the company had been authorized to carry the mails thereon for a suitable compensation.

The second paragraph of the petition (pp. 1–6) alleges in substance that on the day the railway company extended its line, as above stated, to Champion, Michigan, the railway mail service was, by order of the Postmaster General, established and extended to Champion from and after February 24, 1890, and that order provided, among other things, that such extension was "with the understanding that the rate of compensation on this extension will be adjusted in a subsequent order, and in accordance with the law." The order is copied on page 2 and the notice is on pages 2 and 3 of the Record. Subsequently (see page 2), the postal authorities caused the mails on the said route from Milwaukee to Champion to be weighed for thirty successive working days, commencing September 23, 1890. The Postmaster General, December 1, 1890, ordered that the compensation for the transportation of mails on the route between Milwaukee and Champion be fixed from September 23, 1890, to June 30, 1891, at the rate of $35,022.37 per annum, being $132.53 per mile for 264.26 miles, *that being the distance from Milwaukee to Champion;* and that from February 24, the date of the order

establishing and extending the service, as above stated, to September 22, 1890, the day before the weighing of the mails was begun, compensation should be allowed at the rate of $1,178.19 per annum, being $132.53 per mile for the 8.89 miles of extension from Republic to Champion. The notice of the company will be found at the bottom of page 3 and the top of page 4 of the Record. This adjustment and the notice thereof include and treat the extension from Republic to Champion as part and parcel of postal route No. 139,016 "between Milwaukee, Wisconsin, and Champion, Michigan,"

There was a period from February 24 to September 20, 1890, which was not covered by the broad terms of the first paragraph of the order, but the second paragraph gives to the extension between Republic and Champion, from February 24 to September 22, *exactly the same pay per mile as that allowed for the whole route between Milwaukee and Champion, beginning with September* 23, 1890. Thus, a second time, and in a different way, the Department expressed its determination that the route from Milwaukee to Champion was but one route—No. 139,016—and for the whole length of the line the Government was to pay the company at the rate and on the mileage above named for *the whole number of miles between Milwaukee and Champion.* The order and notice of adjustment state that this is "upon returns showing the amount and character of the service for thirty successive working days, commencing September 23, 1890." (Pages 3, 4.)

All this was done and bears date of December 1, 1890, but two days thereafter the Department issued another notice to the company (p. 4) in which it was stated that the compensation on route No. 139,016, between Republic and Champion, "has

been fixed from February 24, 1890, to June 30, 1891, at $132.53 per mile for 8.89 miles extension."

It will be observed that this notice recognizes route No. 139,016 as covering the line between Republic and Champion, although originally it covered only that part of the line from Milwaukee to Republic. It will be observed also, that this notice ignores the fact that prior to December 1, 1890, the mails had been weighed on the whole line of the company, on and along route No. 139,016, from Milwaukee to Champion, a distance of 264.26 miles, pursuant to an order of the Department (p. 5.) directing the weighing of the mails on that route "between Milwaukee and Champion, Michigan, for thirty successive days, commencing September 23, 1890, for the purpose of obtaining data upon which to adjust the pay, in accordance with the acts of Congress governing the same, from February 24, 1890, on extension from Republic to Champion."

That order and the weighing of the mails was pursuant to section 4002, Rev. Stat., copied on page 5 of the Record. This paragraph ends with the averment (p. 6) that the mails so weighed on that route were from Milwaukee to Champion, they being then the terminals of the system operated by the company, and such weighing showed a daily average of 2,363 pounds of mail carried over the entire route between Milwaukee and Champion, and that the average weight of mails carried over that part of the route between Republic and Champion was but 940 pounds.

The third paragraph of the petition (p. 6) alleges that the company immediately, and in pursuance of the order of December 1, 1890, entered upon the work of carrying the mails over that route between Mil-

waukee and Champion, faithfully performing the services required by order of the Department and the Acts of Congress, and became entitled to the full compensation allowed it by that order, viz, $36,200.56.

The fourth paragraph of the petition (p. 6) avers that the United States, instead of paying the full amount due, paid the company at the rate of $132.53 per mile for 8.89 miles, being the extension from Republic to Champion, and refused to pay any sum beyond $86.35 per mile for the mileage on the route between Milwaukee and Republic. The small services was given the big pay.

The next paragraph (pp. 6-9) avers that after the services had been performed, the full amount fixed by the order of December 1, 1890, had been earned, and the payment thereof had been refused, the company presented a claim to the Department for the balance $9,101.08, for its services, but the Department rejected the claim and refused to pay it, asserting that the order of December 3, was a correction of the order of December 1, 1890.

The petition avers that there is no warrant for that contention, and that, under the uniform practice and usage of the Department for many years, whenever postal service is established on an extension of a line or railroad, and the weighing of the mail is had on the entire route for the purpose of ascertaining the rate of compensation, *such compensation is fixed for the entire route and not on the extension alone.* That was the practice of the Department for the fiscal year ending June 30, 1891, as shown by the report of the Postmaster General. The particulars are set forth with exactness on page 7 of the Record. *The compensation for all those routes was readjusted over the entire line.*

That was the practice not only of that fiscal year, but in previous and subsequent years (p. 8), and under such practice, when mails were weighed other than the quadrennial weighings for the purpose of ascertaining the compensation on a railroad route, the compensation of *the entire route* was increased or decreased in accordance with the results of said weighings.

In determining the compensation for carrying the mails on an extension of a mail route, the practice of the Department (pp. 8–9) has been to order a weighing of the mails on the whole line, adjusting the compensation on the whole line from the date the weighing commenced, and on the extension from the date service was authorized, based upon the weights of mail carried, and such has been the practice on the road of this company, as well as on the routes and roads named on pages 8 and 9.

The general practice of the Department with the railroads of the country, and the practice of the Department with the company, are in harmony with its contention and contrary to the acts of the Department in this particular instance.

This interpretation of the statute is the natural and sensible one. Section 4002 at the beginning authorizes the Postmaster General to readjust the compensation to be paid for the transportation of mails on *railroad routes*, not parts thereof. The second portion of the section enacts that "the pay per mile per annum shall not exceed the following rates, namely, on routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars, * * * the average weight to be ascertained, in every case, by the actual weight of the mails for

such a number of successive working days not less than thirty." * * *

The Postmaster General is authorized to readjust the compensation "on *railroad routes* upon the conditions and at the rates hereinafter mentioned." It will be noticed that he is not authorized to split up a route into fragments and to readjust upon part of a route. He is to deal with the whole route, not a part.

The second part of the statute directs that the pay shall not exceed certain rates "on routes carrying their whole length an average weight of mails per day of" * * * Here there is no splitting up of routes into parts or fragments. The Postmaster General is not authorized to fix the pay on *a part of the route*. The legislative purpose, as declared by the language used, was to deal with a route as a complete thing—a complete entity—one which should not be cut up into parts or divided.

Abundant reason can be found to support that legislative intent or purpose. Its wisdom will occur to any one who will reflect upon the results which would follow such division of railroad postal routes into parts or fragments, but whether wise or unwise the intent of the statute is perfectly plain.

We are strengthened in this view by the concluding sentence of the section in which it is enacted that the average weight is to be ascertained by the actual weighing of the mails for not less than thirty working days,—not the weighing of the mails on a part of the route, *but the weighing of the mails for the whole route, in order that the average weight may be ascertained*. Why should the mails be weighed thus if the route is to be divided into parts thereafter?

Evidently the Postmaster General or, more strictly speaking, the Second Assistant Postmaster General, understood that the statute was to be interpreted in the way we claim, because December 1, 1890, in his order of adjustment and notice, he acted on that theory or rule of interpretation. Two days afterwards he experienced a temporary change of mind and tried to undo that which he had done December 1st. We submit that the thing he did December 1, 1890, was lawful and valid, and that which he undertook to do December 3, was unlawful in this, that he tried to exercise a power, and to put an interpretation upon section 4002 which the law does not warrant. Therefore, the alleged order of December 3, 1890, was and is absolutely null and void because without warrant of law.

The interpretation of the Department for many years, as alleged and particularly set forth in the petition, is in harmony with our contention and directly opposed to the act of the Second Assistant Postmaster General in the alleged order of December 3, 1890.

For these reasons we submit that the judgment of the court below should be reversed.

Respectfully submitted.

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